U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

DATE ISSUED: **May 11 , 2000**

CASE NOS.: **1999-LHC-02486, 1999-LHC-02487**

OWCP NOS.: **07-137417, 07-153388**

In the Matter of:

DALE SAVOIE,
Claimant

v.

TRINITY MARINE GROUP,
Employer

and

RELIANCE NATIONAL INDEMNITY COMPANY,
Carrier

APPEARANCES:

ROBERT BRAIWICK, JR., ESQ.
For Claimant

COLLINS ROSSI, ESQ.
For Employer/Carrier

BEFORE: **JAMES W. KERR, JR.**
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act") and the regulations promulgated thereunder. This claim is brought by Dale Savoie, Claimant, against his former employer, Trinity Marine Group, Employer, and Reliance National Indemnity Company, Carrier. A hearing was held in Metairie, Louisiana on January 31, 2000 at which time the parties were represented by counsel and given the opportunity to offer testimony and documentary evidence and to make oral argument. The following exhibits were received into evidence:

1) Court's Exhibit No. 1 ;

2) Claimant's Exhibits Nos. 1-7; and

3) Employer's Exhibits Nos. 1-12.[12]

Upon conclusion of the hearing, the record remained open for submission of written closing arguments which were received by both parties. This decision is being rendered after having given full consideration to the entire record.

Stipulations

After evaluation of the entire record, the Court finds sufficient evidence to support the following stipulations:

(1) That the date the injury/accident allegedly occurred is disputed;

(2) That the fact of injury/accident is disputed;

(3) That there was an employer/employee relationship existing at the time of the alleged injury is not disputed;

(4) That the alleged injury arose in the course and within the scope of employment is not disputed;

(5) That the date the Employer was notified of the injury was June 24, 1995;

---

[1] The following abbreviations will be used in citations to the record: CTX - Court's Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

[2]The Court notes that RX-13 was rejected. Additionally, the testimony of Lyle Fridley was excluded from the record as no professional report was issued as mandated in the Court's pre-trial order. TR 130.

(6) That an informal conference was held on February 27, 1996;

(7) That disability resulted from the injury is disputed;

(8) That the Notice of Controversion was filed on August 18, 1995;

(9) That the date of maximum medical improvement is disputed; and

(10) That Claimant's average weekly wage was $554.86.

Issues

The unresolved issues in this proceeding are date of causation, date of accident, notice, nature and extent of disability, occurrence of second accident.

Summary of the Evidence

Testimonial Evidence

Dale Robert Savoie

Dale Savoie, Claimant, testified that on June 24, 1995, he had been employed by Employer for one and one-half years. He was employed as a first-class outfitter and his duties included working the entire boat installing hatches, portholes and engines. He stated that he was injured once before the two incidents in the instant case. He injured his back about eight or nine months after he began working with Employer in mid-1993. Claimant testified that he was not "out of work" for that accident, but did receive ice and heat treatments in the safety trailer. His next injury occurred on Saturday, June 24, 1995 when he was moving slings which they were using to lift a boat. Claimant testified that he told the leadman, Mike Leoni, that he was hurting and that he was going home. He stated that he returned to work on Monday in severe pain and told Mike Davis in the safety office what had occurred on Saturday. Mike Davis asked if he wanted to see the doctor and he was sent down to see Dr. Segura, the company doctor, around lunchtime. Claimant testified that he was initially diagnosed with a muscle strain and was treated with ice and heat treatments and a cream. He stated that upon his return the following week, Dr. Segura stated that if it was a muscle strain it should have resolved. Claimant then went back to the office and spoke with Mr. Davis and requested that he be allowed to see his own doctor. Mr. Davis, not Claimant, completed a written report on the June 24 accident which Claimant signed. He stated that Mr. Davis does all of the reports. TR 14-21, 71, 73.

Claimant testified that he continued to work while he was treated by Dr. Segura. He stated that he was supposed to be on light duty. Initially he was making copies for the leadman and performing other office duties, but then he was transferred to the warehouse where he had to climb

ladders and climb up on top of shelves. Claimant testified that he could not endure the climbing and told Mr. Davis that he "couldn't take it no more." He stated that he has never returned to his work as an outfitter. Claimant testified that he did recall seeing a doctor for a work related injury where he had a mark on his neck. TR 21, 67-69.

Claimant testified that he was next examined by Dr. Betancourt who prescribed medication and referred him to a chiropractor who prescribed massage bed therapy. He stated that the chiropractic treatment actually made his condition worse. He added that he is aware that Dr. Betancourt stated that she believed that he had a low tolerance for pain and was also a heavy smoker which impacted his pain receptors. Claimant testified that he went to Dr. Stuart Phillips about two months after his accident. He stated that he has been treated by Dr. Phillips since that time. Claimant testified that Dr. Phillips has treated him with pain pills (Vicodin, thrice daily), muscle relaxers (Flexeril, thrice daily) and sleeping pills (Elavil) and has recommended surgery which Claimant cannot afford. He stated that the medications make him "real groggy" and he is limited in what he can do. He added that he attempts to do minor household chores. Claimant testified that as long as he limits his activity, his pain is mild. TR 22, 23, 26-28, 32.

Claimant testified that he had suffered minor injuries while working for Employer when he fell into the hole while moving a pump and also when he ran into the outdrive on a boat bumping his head and causing a knot on his shoulder. He agreed that the accident involving the outdrive occurred on June 17, 1995 and the back pain he related to Dr. Nutik, relative to that incident, involved pulling his back "a little bit" when he hit the outdrive. Claimant testified that on August 25, 1995, while on light duty, he re-injured his back when Mr. Davis inadvertently spilled coffee on his leg causing him to jump, twisting his leg and back. He stated that the movement caused his back pain to exacerbate. He tried to walk around to relieve the pain, but without success. He added that his long term pain is about the same after Mr. Davis spilled coffee on him. Claimant testified that he did not complete a written accident report for the coffee incident. Claimant testified that after the August 25, 1995 incident he was moved to the trailer where he worked sitting on an ice chest. He stated that Mr. Davis tried to secure a chair for him, but he never received one. He added that he then "gave up on it." TR 23-25, 37, 38, 65, 69.

Claimant testified that he did not work for compensation after leaving Employer. He stated that although his wife owns a dry cleaning business, he has never been employed there. He added that he does not repair the machinery or anything of the kind for his wife's business. Claimant testified that before working in shipyards he worked with the state constructing roads and bridges. He stated that he left high school in the twelfth grade and has neither trade school education nor industrial craft certificates. TR 25, 26, 28-30.

Claimant testified that he left Avondale when he was passed over for a promotion and the man promoted fired him. He stated that his supervisor told him just to wait a couple of weeks and he would be rehired. He added that instead he went to Employer and was hired. Claimant testified that the employee who fired him stated that he was angered because Claimant was just walking around and not doing anything. He acknowledged that he never contested the firing. TR 33, 34.

Claimant testified that he spoke to Karen New, representative of carrier, and gave a recorded statement. He stated that he spoke to her concerning the accident on June 17, 1995 and the accident on June 24, 1995. TR 39.

Claimant testified that he was informed of two available positions as a security guard, one a night position. He stated that he did not apply for the positions as he was not feeling well and did not believe that he could defend himself if someone broke into the yard. He added that he understood that as the guard "you had to bring the clock and go around the yard and different things." Claimant testified that he would be able to perform the positions of dispatcher, car-door unlocker and repair technician for six hours a day. He stated that, with training, he could perform the position of flow meter repair mechanic for eight hours a day. TR 117-121.

Audiotape[3]

Claimant stated that the day he was injured he was putting shackles in place to lift a boat. He began to experience back pain at about 9:00 and at about 10:30 his back began to hurt badly, but he stayed until the job was complete at 11:15 or 11:30. Claimant stated that "everyone keeps putting it (the accident) on the 24th, because that's when I went to the doctor, but it happened on the Saturday before that, and that happened at about 10:30 that morning." He added that the pain began in the lower part of his back. Claimant stated that he first related the accident to Mike Leoni, his leaderman, then spoke to Al Cazeau. He answered that he had no work related injuries in the last five years. TR 42, 46, 47, 53-55, 60, 61; EX-9.

Claimant stated that he returned to work on Monday and told his boss that he was hurting. He was instructed to take it easy because it was probably a pulled muscle. He stated that he just did "little odds and ends" around the office until Wednesday when he saw Dr. Segura who opined that it was a pulled muscle. He added that x-rays were taken and he was treated for two weeks for a muscle strain. Claimant stated that additional x-rays were then taken and Dr. Segura noted that Claimant's spine had begun to narrow. He stated that after the treatment failed to give him relief he wanted to see his doctor and was told by Mr. Davis that the company did not approve of seeing other than the company doctor. Claimant added that he went to see Dr. Betancourt, a general physician. TR 55-57.

Claimant stated that Dr. Betancourt explained that the cartilage in the last disk in his back was crushed and the disks were so close together that just bending to pick something up could cause the disks to shatter. He stated that the treatment prescribed by Dr. Betancourt was not successful and they were discussing changing the treatment. Claimant explained that he had constant pain in his low-back and intermittent pain in his mid-back. TR 58.

---

[3]The Court notes that Claimant acknowledged that the male voice on the audiotape is his own voice and the female voice is that of Karen New. Date of audiotape August 1, 1995. The Court reviewed the portions of the audiotape not included in the transcript.

Nancy T. Favaloro

Nancy Favaloro, expert in vocational rehabilitation, testified that she reviewed medical reports from Drs. Phillips, Betancourt, Nutik, Naccari and Segura. She also reviewed chiropractic reports and reports from Employer. She stated that she personally interviewed Claimant. She testified that she relied on the information in the aforementioned reports and identified jobs within Claimant's light work classification. Positions identified include dispatcher (Holi Temporary Services, $8.00 per hour); car-door-unlocker (Pop-a-Lock, $8 per hour); security guard (American Commercial Security, $6-$7 per hour); security guard (Vinson Guard Service, $5.30-$7.75 per hour); security position (Hilton Hotel, $7.25-$8.00 per hour); repair technician (Industrial Welding Supply, $6-$7 per hour); flow meter repair mechanic($7.00 per hour). TR 75-79.

Ms. Favaloro testified that she used the Department of Labor's description of light duty to identify the positions. She stated that the openings were available October 8 through October 16, 1998. She added that she contacted the employers on October 20 and 21 and they verified, with the exception of Vinson and Thompson, that Claimant had not received an application from Claimant. Ms. Favaloro testified that the positions were available when she contacted the Employers. TR 79-81.

Ms. Favaloro testified that the reports on which she relied were compiled in 1995. She stated that Dr. Phillips' notes from an office visit with Claimant on May 21, 1998 stated that Claimant was temporarily totally disabled May 21, 1998 through August 21, 1998. She added that he did not include restrictions in the report and she did not refer to the physical findings of Dr. Phillips in determining the fitness of the positions identified. She did not take into consideration the medications taken by Claimant. TR 82-85.

Michael T. Davis

Michael T. Davis, safety director for Halter Marine for three and a half years, testified that he had no recollection of Claimant coming to him for treatment related to an accident in early 1994. He stated that he was not in the manager's position until September of 1994. He added that he had no recollection of Claimant incurring an injury when he spilled coffee on him. TR 88-90.

Mr. Davis testified that reports of all accidents, no matter how small, are documented first on the first aid log. He stated that the first-aid log manifested no record of an injury to Claimant on August 25, 1995. There is no record of treatment and no incident report was filed. Mr. Davis testified that he recalled two accidents which Claimant suffered, one on June 17, 1995 and another on June 24, 1995, the second an alleged back injury. He stated that he investigated the June 24 accident, which was reported on June 27, speaking with Claimant and Ms. Claire Hernez who sent Claimant for treatment at Dr. Segura's. TR 91, 92, 94, 98.

Mr. Davis testified that Claimant's duties after his June 24, 1995 injury, which coincide with his job restrictions, are laid out in the transitional-work form. He stated that Claimant's transitional-work form dated July 10, 1995 states that he was released by Dr. Naccari on July 10, 1995 and his

job assignment is within the recurrent physical limitations set by his doctor. Duties stated included making copies, filing papers, and walking to and from the copy machine. A subsequent transitional-work form was completed on August 16, 1995. The duties in that report included checking inventory, retrieving parts from the warehouse, and making copies. Mr. Davis testified that the stated duties involved no climbing as everything was on the lower level and there was an elevator if needed. TR 95-97.

Mr. Davis testified that company policy in July and August 1995 mandated that if an injury occurred or an incident recurred, the employee would notify his supervisor, then notify the first-aid department. He stated that he did not recall spilling coffee on Claimant which caused him to jump from a chair and twist his back. He added that the incident was not on the first-aid log and there was no report of such an incident filed. Mr. Davis testified that the first-aid log only indicates reports to the first-aid department. TR 98, 99.

Kathy Savoie

Kathy Savoie, wife of Claimant, testified that she is the owner of Golden Cleaners which she purchased in May 1992. She stated that Claimant has never been employed by the cleaners. Ms. Savoie testified that the only time her husband assisted her was if she needed a part picked up which occurred approximately once in four years. TR 104.

Medical Evidence

Diana Betancourt, M.D.

Dr. Diana Betancourt first examined Claimant on July 17, 1995 for a work related lower back injury sustained on that date when lifting. Dr. Betancourt noted that following the injury Claimant began experiencing neck and lower back pain with pain radiating to both arms and both lower extremities with limitation of movement which was affecting Claimant's work performance. Claimant was experiencing "excruciating" pain in his lower extremities. The disruption of Claimant's sleep due to nocturnal back pain was also causing him difficulty with his work performance. Upon physical examination Dr. Betancourt noted moderate to severe pain in the posterior aspect of the neck with limitation of movement, extension, flexion, and lateral movement. Claimant also evidenced lumbar range of motion within normal limits with moderate pain and moderate to severe pain in the lumbosacral area. Dr. Betancourt diagnosed lumbalgia, cervicalgia, lumbar plexus injury and myofacitis. Recommendations included spinal manipulation, conservative phsiotherapy, medication for pain and inflammation and strict bed rest for one week with relaxation. Dr. Betancourt opined that Claimant should be off work until further notice. RX-3 pp. 3, 4.

Claimant next saw Dr. Betancourt on July 17, 1995. Diagnosis and recommendations remained the same. RX-3 p. 1, 2.

Chad W. Millet, M.D.

Dr. Chad Millet, orthopedist, examined Claimant, at the behest of Employer on July 20, 1995, experiencing quite severe pain in his lower back, both hips and legs and occasional numbness in his feet. Claimant stated that he was on light duty working as a security guard at night which mandated walking half of every hour which strained his back further. On physical examination, Dr. Millet noted that Claimant exhibited a restricted range of motion on flexion and rotation of his lumbar spine and tenderness over both the paraspinal muscles and the posterior spinous ligament. Dr. Millet diagnosed lumbar strain and mild degenerative disc disease L5-S1. He recommended medication, aggressive physical therapy with therapeutic modalities and a strengthening program. He noted that Claimant should remain on light duty and participate in a work hardening program before returning to work. RX-4 pp. 1, 2.

Gordon P. Nutik, M.D.

On August 10, 1995, Dr. Gordon Nutik orthopedic surgeon, examined Claimant. Claimant related that he had two work related injuries; the first on June 24, 1995 when he bumped his head on the out drive experiencing a bump on his right shoulder blade and a slight lower back pull. He was treated with ice and the lump on his shoulder blade disappeared. The second injury on June 24, 1995 was the result of Claimant lifting 200 pound shackles over the course of five hours. He began to experience pain after about three hours, took a break and returned to work. After another hour of work he was hurting badly, but remained until the ship was launched. He reported the incident that day, a Saturday, and returned to work on Monday complaining of low back pain. He worked Monday and Tuesday and the "safety man" applied heat for two or three days. For the next three weeks Claimant saw Dr. Segura weekly and was treated with Ben-Gay. He related that he then saw Dr. Millet who, upon reviewing his x-rays, agreed that Claimant could "work, but just stand or sit." He subsequently saw Dr. Betancourt who diagnosed crushed cartilage in the lower back. He was treated with a muscle stimulator, stretching and ice packs. RX-5 pp. 1, 2.

Claimant related that he currently suffered pain in his lower back generally localized in the center radiating posteriorly about his thighs and calves to his feet. The pain is constant and occasionally sharp and shooting. Upon physical examination, Dr. Nutik notes pain on palpation at L5 and over the right and left posterior superior iliac spine. He noted that lateral bending was possible to 75% of normal. Neurologic examination of the lower extremities revealed no sensory, motor or reflex abnormalities. X-rays were negative. Dr. Nutik opined that Claimant suffered a soft tissue injury which should resolve in three weeks from the date of the examination. He stated that

Claimant should be capable of light work. He recommended an MRI to rule out underlying disc disease and a workhardening program. RX-5 pp. 3, 4.

Louisiana Clinic

Dr. Phillips, orthopedic surgeon at Louisiana Clinic, first examined Claimant on September 19, 1995 for a work related injury to his back experiencing severe back pain radiating into both lower extremities and his hips and thighs associated with numbness. Claimant noted muscle weakness, pain with bowel and urinary function and pain with sexual intercourse. Symptoms increase when sitting,

bending and lifting. Cervical discomfort is moderate radiating into both trapezius zones with weakness in both hands. Claimant experiences headaches and dizziness. Upon physical examination, Dr. Phillips noted an abnormal lumbar exam with a 25% decrease in the motion in Claimant's lumbar spine, moderate spasm and lower lumbar tenderness. Dr. Phillips recommended an MRI and possibly a CT with multiplanar reconstruction as Claimant was three months post-injury. He delayed diagnosis until tests were completed and prescribed Vicodin, Flexeril and Elavil. CX–1 p. 14.

Dr. Phillips next saw Claimant on November 6, 1995 with the same symptomology. He refused diagnosis as the MRI had not been performed. He noted that Claimant was temporarily totally disabled. On January 18, 1996 Dr. Phillips examined Claimant and diagnosed a lumbosacral disc herniation based on Claimant's MRI. Claimant remained temporarily totally disabled. Claimant returned on April 9, 1996, ready to undergo a lumbar fusion as his back and leg pain persisted. Claimant remained temporarily totally disabled. Dr. Phillips examined Claimant on June 4, 1996 and noted that he was one year post injury, temporarily totally disabled and should have the recommeded surgery. On September 17, 1996 Dr. Phillips examined Claimant noting continued back and leg pain with the addition of rather marked loss of motor power in the peroneals confirming lumbosacral disc injury and continuing temporary total disability. He recommended an EMG, lumbar discogram and disc surgery. Dr. Phillips examined Claimant on December 11, 1996; March 26, 1997; and May 6, 1997 with continued symptomatology noting that Claimant had not been cleared for surgery and remained temporarily totally disabled. Dr. Phillips examined Claimant on eleven occasions from August 21, 1997 until October 26, 1999 noting on each visit that Claimant's condition remained unchanged and that he had not been cleared for surgery. Dr. Phillips diagnosis remained lumbar disc displacement and temporary total disability. Claimant continued on prescribed medications. CX-1 pp. 4-13.

Lafayette Street Medical Center

Claimant was initially examined at Lafayette Street Medical Center on July 17, 1995 for constant moderately severe pain in his lower back with frequent moderately severe weakness in the leg area. It was noted that Claimant's condition was chronic. Claimant was treated for segmental misalignment with manual adjustment, heat therapy, mechanically applied traction and EMS to the lumbar region. Claimant received the aforementioned treatments on twenty-four occasions between

July 17, 1995 and September 8, 1995. Claimant showed only a modest degree of improvement in back pain and paresis of the leg muscles. CX-3 pp. 26-35.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon the Court's observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, the Court has been guided by the principles enunciated in Director, OWCP v. Maher Terminals, Inc., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, the Court may

accept or reject all or any part of the evidence, including that of medical witnesses, and rely on its own judgment to resolve factual disputes or conflicts in the evidence. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251, 28 BRBS 43 (1994).

I. Notice of Injury

Section 12(a) of the Act provides:

> (a) Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment. ... Notice shall be given (1) to the deputy commissioner in the compensation district in which the injury or death occurred, and (2) to the employer.

33 U.S.C. § 912(a).

It is the claimant's burden to establish timely notice. The Fifth Circuit has held that Section 20(b) applies equally to both Sections 12 and 13 of the Act. Avondale Shipyards v. Vinson, 623 F.2d 1117 (5th Cir. 1980); United Brands Co. v. Melson, 594 F.2d 1068, 1072 (5th Cir. 1979), aff'g 6 BRBS 503 (1977). Failure to provide timely notice as required by Section 12(a) bars the claim, unless excused under Section 12(d). Under Section 12(d), failure to provide timely written notice will not bar the claim if the claimant shows either that the employer had knowledge of the injury during the filing period, that the employer was not prejudiced by the failure to give timely notice, or that the failure was excused. 33 U.S.C. § 12(d); See Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32, 34(1989). Prejudice is established where the employer demonstrates that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. Strachan Shipping Co. v. Davis, 571 F.2d 968, 972, 8 BRBS 161 (5th Cir. 1978), rev'g 2 BRBS 272 (1975); White v. Sealand Terminal Corp., 13 BRBS 1021 (1981).

Where an employer has knowledge of a work-related accident but does not have knowledge of the resulting injury, the employer will be deemed not to have knowledge of a work-related accident under Section 12(d). Kulick v. Continental Baking Corp., 19 BRBS 115 (1986). In the absence of evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, that an employer has been given sufficient notice under Section 12. See Shaller v. Cramp Shipbuilding & Dry Dock Co.,

23 BRBS 140, 145 (1989). Therefore, an employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant's failure to provide adequate notice. See Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990).

Employer argues that it did not have notice of the "coffee incident" which Claimant alleges occurred on August 1, 1995. Additionally, Employer argues that either the aforementioned accident "never happened, did not happen at work, or did not happen as the Claimant alleged." Claimant argues that the accident occurred, but that it was of such a minor nature it was not significant enough to relate to Dr. Phillips on his initial visit. Additionally, Claimant argues, and the medical evidence supports, that the incident involved only a temporary aggravation of his back pain which did not further disable the Claimant. Thus, the issue of notice is mooted as lack of notice did not prejudice Employer.

II. Credibility Evaluations

Employer contends that Claimant's testimony should be discredited for various reasons. First, Employer notes that Claimant testified that he did not have any accidents for five years before the alleged June 24, 1995 accident and then recanted when presented with a report of a back injury with a former employer. Claimant testified that he had not recalled the incident as it was a minor injury to his neck for which he missed only a few days of work. The Court notes that the LS-202 cites the injury as a cervical contusion. Second, Employer contends that Claimant vascillates as to the date of the injury testifying that the injury occurred on June 24, 1995 while giving a recorded statement that the incident occurred on June 17, 1995. However, the Court notes that in the recorded statement played at the hearing Claimant states that "everyone keeps putting it (the accident) on the 24th, because that's when I went to the doctor, but it happened on the Saturday before that, and that happened at about 10:30 that morning." Additionally, Employer argues that Claimant completed a questionnaire upon seeing Dr. Betencourt that included date of onset of complaints as June 14, 1995. Moreover, Claimant related the date of the injury as June 24, 1995 to Drs. Millet, Phillips and Nutik. As noted above, the administrative law judge has the discretion to determine a witness' credibility. Furthermore, the administrative law judge may accept a Claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of Claimant's injury. Kubin v. pro-Football, Inc., 29 BRBS 117, 120 (1995); See Plaquemines Equipment & Machine Co. V. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

The Court found Claimant's testimony straight-forward, generally unequivocal, and credible throughout the hearing. Thus, this Court finds that Claimant has provided consistent and unequivocal testimony which is supported by the medical evidence. This Court further finds that the medical evidence establishes that Claimant suffered an injury and continued to experience pain and symptoms as a result of his injury.

III. Fact of Injury

To establish a prima facie claim for compensation, a claimant need not affirmatively establish

a connection between the work and harm. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his injury was causally related to his employment if he establishes that he suffered a physical injury or harm and that working conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. See Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989). An accidental injury occurs if something unexpectedly goes wrong within the human frame. An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee might have been. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (5th Cir. 1954). The claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980). However, the claimant must show the existence of working conditions which could have conceivably caused the harm alleged. See Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D.C. Cir. 1982).

The Court will address the issue of the June 24, 1995 and the August 1, 1995 accidents with the issue of notice as related to the August 1 incident included in the discussion.

The medical evidence establishes that Claimant suffered an injury to his back on June 24, 1995. Additionally, this Court finds that working conditions, the lifting of a boat with two hundred pound slings, existed which could have caused the injury to Claimant's back. Employer argues that based on the records of Dr. Betancourt Claimant's date of onset of pain was June 14, 1995 and, thus, Claimant's complaints must be related to an event prior to the alleged injury of June 24, 1995. However, the Court notes that Claimant was working without limitation up to the date of the June 24, work related injury. Employer also argues that Claimant's lack of credibility relating to an inconsistent history regarding the date of the accident, the mechanism of the accident and the symptomatology precludes Claimant's subjective complaints from establishing a prima facie case for compensation. However, this Court has previously found Claimant to be credible. Thus, Claimant has established a prima facie claim for compensation as he has established that he has incurred a back injury and work conditions existed which could have caused his injury.

Employer argues that it did not have notice of the "coffee incident" which Claimant alleges occurred on August 1, 1995. Additionally, Employer argues that either the aforementioned accident "never happened, did not happen at work, or did not happen as the Claimant alleged." Claimant argues that the accident occurred, but that it was of such a minor nature it was not significant enough to relate to Dr. Phillips on his initial visit. Additionally, Claimant argues, and the medical evidence supports, that the incident involved only a temporary aggravation of his back pain which did not further disable the Claimant. Failure to provide timely notice as required by Section 12(a) bars the claim, unless excused under Section 12(d). Under Section 12(d), failure to provide timely written notice will not bar the claim if the claimant shows either that the employer had knowledge of the injury during the filing period, that the employer was not prejudiced by the failure to give timely notice, or that the failure was excused. 33 U.S.C. § 12(d); See Addison v. Ryan-Walsh Stevedoring Co., 22 BRBS 32, 34(1989). Thus, the issue of notice is mooted as lack of notice did not prejudice Employer. Moreover, the Court will not address the issue of causation relative to the August 1, 1995 incident as Claimant states that it did not cause disability under the Act.

Once Claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). The employer must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and employment or working conditions. Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982); Del Vecchio v. Bowers, 296 U.S. 280 (1935).

This Court does not find that Employer has provided sufficient evidence to rebut the Section 20(a) presumption. Employer points to the lack of credibility in Claimant's testimony. However, this Court has already credited Claimant's testimony in regard to the work incident and harm. Additionally, Employer was treated by Dr. Segura on July 28, 1995 at the behest of Employer. Dr. Diagnosed a lumbosacral strain. After reviewing all of the medical evidence at hand as well as Claimant's testimony, this Court finds it obvious that Claimant sustained an injury to his back at work. Accordingly, this Court finds that Claimant has established his prima facie case while Employer has not provided sufficient evidence to

IV. Maximum Medical Improvement

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979). However, if the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that maximum medical improvement has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245 (1986); See Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142 (1978), aff'd mem., 617 F.2d 292 (5th Cir. 1980).

A judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quinton Eng'rs, 14 BRBS 395, 401(1981). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15(1988). The date of permanency may not be based on the mere speculation of a physician. Steig v. Lockheed Shipbuilding & Constr. Co., 3 BRBS 439, 441 (1976). In the absence of any other relevant evidence, the judge

may use the date the claim was filed. Whyte v. General Dynamics Corp., 8 BRBS 706, 708(1978).

There is no evidence of record upon which to base a finding of maximum medical improvement. Thus, this Court finds that Claimant has not reached MMI.

V. Nature and Extent of Disability

Disability under the Act means "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to either have no loss of wage earning capacity, a total loss, or a partial loss. The employee has the initial burden of proving total disability.

To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

This court finds that Claimant has established a prima facie case of total disability as evidence establishes that he cannot return to his regular employment due to a work related injury.[4]

Suitable Alternative Employment / Partial Disability

Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988).

---

[4]Employer argues that the injury of August 1995 further disabled Claimant and, thus, it is the compensable injury. However, the Court notes that Claimant testified, and the medical records support, the August 1995 incident caused only a temporary aggravation and did not further disable Claimant. Thus, the June 24, 1995 injury is the compensable injury.

An employer can meet its burden by offering the claimant a job in its facility, Spencer v. Baker Agricultural Co., 16 BRBS 205 (1984), including a light-duty job, so long as it does not constitute sheltered employment. Darden v. Newport Neews Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986); Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10, 12-13 (1980). The employer's job offer which is too physically demanding for the Claimant to perform is not suitable alternate employment. Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980); Perini Corp. v. Heyde, 306 F.Supp. 1321, 1328 (D.R.I. 1969); Mason v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

This Court finds that from August 25, 1995 through January 30, 2000 Claimant remained totally disabled. Although, Employer offered Claimant a light-duty position, Claimant credibly testified that the position was too demanding physically. Thus, the position with Employer did not establish suitable alternative employment. Additionally on October 8, 1998 Employer offered a labor market survey which enumerated several positions. However, Dr. Phillips, Claimant's treating physician opined that as of November 6, 1995 and continuing, Claimant was temporarily totally disabled. Subsequently, at the hearing on January 30, 2000 Claimant testified that he was capable of performing the positions of dispatcher ($8 per hour), car-door unlocker ($8 per hour) and repair technician ($6-$7 per hour) for six hours a day and the position of flow meter repair mechanic ($7 per hour) for eight hours a day. Thus, because Claimant testified that he is capable of performing

the aforementioned positions, Employer has met his burden of identifying suitable alternative employment as of January 30, 2000. This Court finds that Claimant has a wage earning capacity of $7.35 per hour.[5]

VI. Necessary and Reasonable Medical Expenses

Section 7(a) of the Act provides that:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require.

33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie

[5]To determine wage earning capacity, the Court used an average of the positions which Claimant testified that he was capable of performing.

case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'g 12 BRBS 65 (1980).

The Court has previously found that Claimant's back problems were caused by his work injury. Thus, Claimant is due reasonable and necessary medical treatment for his work related back injury.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from August 25, 1995 until January 30, 2000, based on an average weekly wage of $554.86 with Employer receiving a credit for wages earned while on light duty with Employer.

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from January 31, 2000 and continuing based on a wage earning capacity of $7.35 per hour and his average weekly wage of $554.86.

(3) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

(4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

(5) Employer/Carrier shall pay or reimburse Claimant for reasonable medical expenses, with interest in accordance with Section 1961, which resulted from the injury. See 33 U.S.C. §907.

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

Entered this ____ day of _____, 2000, at Metairie, Louisiana.

JAMES W. KERR, JR.
Administrative Law Judge

JWK/cmh